

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

No. 76-4085

B

In the United States Court of Appeals
for the Second Circuit

No. 76-4085

STATE OF NEW YORK

Petitioner,

and

S & E SHIPPING CORPORATION,

Intervenor,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents,

and

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA PUBLIC UTILITIES COMMISSION,
SOO LINE RAILROAD COMPANY AND
CONAGRA, INCORPORATED,

Intervenors.

On Petition for Review of Orders
of the Interstate Commerce Commission

PETITION FOR REHEARING

AND REHEARING IN BANK

BY LOUIS A. H. PEPPER

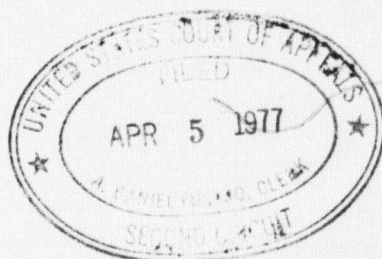
36 West 44 Street
New York, New York 10036
(212) 575-0925

C. HAROLD PETERSON

Soo Line Railroad Company
Soo Line Building
Minneapolis, Minnesota 55440
(612) 332-1261

PETER A. GREENE

404 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-8800



Dated: April 4, 1977

Attorneys for Soo Line
Railroad Company and
ConAgra, Incorporated

In the United States Court of Appeals
for the Second Circuit

No. 76-4085

STATE OF NEW YORK

Petitioner,

and

S & E SHIPPING CORPORATION,

Intervenor,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents,

and

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA PUBLIC UTILITIES COMMISSION,
SOO LINE RAILROAD COMPANY AND
CONAGRA, INCORPORATED,

Intervenors.

On Petition for Review of Orders
of the Interstate Commerce Commission

PETITION FOR REHEARING

Intervenor respondents Soo Line Railroad Company and
ConAgra, Inc. respectfully petition for rehearing of the
Opinion and Judgment entered in this case on March 2, 1977,
by a panel of this Court consisting of Circuit Judges Anderson
and Timbers. ^{*/}

STATEMENT

In Unit Train Rates on Wheat, Minn. & Wisc. to Martins
Creek, Pa., Investigation and Suspension Docket No. 8899,

^{*/} Judge Hays heard argument on November 8, 1976, but
has not had an opportunity to participate further in the
case because of illness.

the Interstate Commerce Commission found summer and winter level unit train rates on wheat from the Twin Cities and the Twin Ports to Martins Creek, Pennsylvania to be just, reasonable and otherwise lawful. The State of New York, representing various New York agencies and the Buffalo, New York Chamber of Commerce, petitioned this Court for review of that decision. A Great Lakes water carrier intervened in support of the petitioner. Soo Line, ConAgra, the State of Pennsylvania, and the Pennsylvania Public Utilities Commission intervened in support of the Commission.

In the review proceeding the petitioners alleged that the unit train rates violated Section 3(1) [49 U.S.C. §3(1)] and 3(4) [49 U.S.C. §3(4)] of the Interstate Commerce Act. The Court affirmed the Commission's Order insofar as the "winter" unit train rates were concerned (See Footnote 21 at p. 2134). It found that the summer rate from the Twin Ports did not violate Section 3(1). However, it remanded the case to the Commission "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines" in violation of Section 3(4) of the Act. ^{*/}

^{*/} While the Court's opinion on this point is not expressly limited to the rate from the Twin Ports, it is inconceivable that the summer unit train rate from the Twin Cities, located over 100 miles southwesterly of the Twin Ports, to Martins Creek, located over 200 miles southeasterly of Buffalo, could be deemed to discriminate against a water carrier connecting with the Erie or other railroads at Buffalo, New York. Grain has never and will never move on a through rate basis in a rail-lake-rail route from the Twin Cities to Martins Creek or any other Eastern destination beyond Buffalo via a Twin Ports-Buffalo route. The Chicago, Rock Island & Pacific Railroad Company, which is a party to the unit train rates from the Twin Cities, intervened in the (continued on next page)

The primary thrust of this petition is that the Court erred in failing to recognize that the record before the Commission could not possibly support a finding or conclusion that the summer unit train rate from Duluth-Superior (or certainly from the Twin Cities) to Martins Creek, Pennsylvania discriminated against water carriers transporting grain from the Twin Ports to Buffalo, New York. The water carriers purportedly represented by New York before this Court advised the Commission that they had "no objection" to the proposed rates. (See pp. 10-11, infra)

The Court also erred in not following the doctrine set forth in Slay Transportation Co., Inc. v. United States, 353 F.Supp. 555, 558 (E. D. Mo. 1973) that "the time appropriate under its practice" for asserting contentions of administrative error is the time at which a petition for reconsideration of an I.C.C. Order is filed and that, in the absence of such petition being filed, the right to judicial review is waived. This case classically illustrates the soundness of that rule.

In the Commission proceedings, pursuant to the provisions of Section 15(7) [49 U.S.C. §15(7)], the railroad respondents had the burden of proving that the proposed rates were just and reasonable and thus did not violate Section 1(5) [49 U.S.C. §1(5)]. They did not have the initial affirmative burden, as

*/ Footnote continued from page two. Commission proceedings and petitioned for reconsideration of the Commission's Initial Decision (App. 523a et seq.). Rock Island does not serve the Twin Ports. Certainly §3(4) cannot be invoked against that carrier. If Rock Island can publish such a rate from the Twin Cities, the Soo Line must necessarily be afforded the same privilege.

noted by this Court at p. 2134 of its Decision, of proving the proposed rates do not violate Section 3(1). Clearly, also, they had no initial burden of proving the rates did not violate Section 3(4) or any other section of the Act.

The Court also erred in holding that water carriers subject to Part III of the Interstate Commerce Act [49 U.S.C. 301 et seq.] are protected by §3(4) when transporting grain or other bulk commodities exempt from the Commission rate regulatory powers under §303(b) [49 U.S.C. 303(b)] and that Great Lakes carriers serving Buffalo, New York are "connecting lines" within the purview of Section 3(4) with respect to unit train rates which do not involve routing through the City of Buffalo.^{*/}

NEITHER THE INTERSTATE COMMERCE ACT
NOR THE COMMISSION'S HEARING PROCESS
PLACED UPON RAILROAD RESPONDENTS
THE BURDEN OF PROVING THE PROPOSED
RATES DID NOT VIOLATE SECTION 3(4)

The Commission, Division 2, rendered its Initial Decision on July 18, 1974. That Decision contains an extensive discussion of the evidence introduced by all of the parties. (See App. 444a-456a, 488a-512a) Among other things, the railroad respondents' evidence showed:

(1) In setting the level of the proposed rates respondents did not go any lower than necessary to meet the alternative transportation cost available to the shipper (id at 444a).

^{*/} These petitioners readopt the argument relating to these issues set forth at pages 45-53 of their brief to the Court.

(2) Respondent Soo Line owns over 2000 jumbo covered hopper cars suitable for handling grain in unit trains (id at 446a).

(3) The proposed rate during the season of open navigation yields 72.25¢ per cwt, \$1,474 per car, and \$73,695 per train. During the closed season of navigation the corresponding figures are 88¢, \$1,795, and \$89,760. This operation is substantially more profitable to the respondent railroads than the Buffalo unit train rate (id at 449a).

(4) Erie has moved wheat on behalf of ConAgra from Buffalo to Martins Creek at a 5-car rate of 40¢. Its Buffalo terminal is congested. Seventeen inbound and 11 outbound Erie trains and six inbound and six outbound Norfolk & Western trains move through the terminal each day. In addition 430 cars are delivered daily to connections and about the same number are received from connections. Forty-one interchange and industry engines work out of the yard and there are extensive piggyback and automobile loading operations. Congestion and bad weather frequently conspire to bring about delays in the handling of freight cars at Buffalo (id at 450a).

(5) Although the 5-car rate is profitable, it does not offer the profit potential presented by the proposed rate. The shipments originate at Buffalo and the movement of traffic through this terminal is expensive and time consuming (id at 451a-452a).

(6) The unit train moves as a 50-car unit from Chicago to Portland, Pa. on the Erie and with a minimum of terminal handling from Portland to Martins Creek. There is a minimum of billing expenses, improved utilization of cars, and locomotive and crew needs can be planned with some predictability. The requirement for three consecutive trainload movements eliminates the cost of assembly and break-up of trains after each movement (id at 452a).

(7) The limited amount of capital available to Erie makes the proposed rate specially attractive because Soo will furnish the cars.

During the period from April through November, 1973, there was a shortage of 3,394 covered hopper cars or an average of 424 cars a month on the Erie. (ibid)

(8) The Erie calculates that 714 covered hopper cars are required to handle ConAgra's Buffalo to Martins Creek traffic. With the approval of the proposed rates these cars could be used elsewhere, resulting in incremental revenue of \$447,261. (ibid)

(9) Whereas Erie faces intense motor carrier competition in seeking to move wheat from Buffalo to Martins Creek, it anticipates handling all of ConAgra's wheat requirements at Martins Creek if the unit train rates are approved (id at 453a).

The principal factual issue which was vigorously litigated by the railroads, ConAgra, protesting Buffalo mills and Penn Central in the Commission proceeding, was whether Erie's net revenue position would be improved or worsened by approval of the proposed unit train rates. The Commission very carefully considered that question and concluded that "respondent Erie stands to benefit by an overall improvement in its net revenue position, provided of course that ConAgra tenders all or most of its traffic to the all-rail route. In addition, respondent can reasonably expect other benefits..." (id at 463a)

The Initial Decision's discussion of evidence introduced by parties purportedly represented^{*/} by New York in the judicial review proceeding is briefly set forth at pp. 501a-504a in

^{*/} Despite New York's contrary contention, it does not represent the Lake Carriers' Association or any water carrier whose interest was represented before the Commission. Although intervenor S & E Shipping Company is a water carrier, it did not participate in proceedings before the Commission.

the Appendix. The discussion is brief because the evidence they submitted was minimal. None of the testimony submitted by these parties contained one shred of evidence supporting a finding that the proposed rates violate Section 3(4) of the Act.

Specifically, no protestant in the Commission proceedings introduced any evidence supporting a contention:

- (1) that unit train operations from Buffalo to Martins Creek via the Erie were practical or economically feasible
- (2) that any party had ever requested the Erie to publish unit train rates on grain or grain products from Buffalo to any eastern destination
- (3) that any shipper would ever use such a rate to move grain to Martins Creek^{*/} or other destinations.

As previously noted, when a new railroad rate publication is filed with the Commission, Section 15(7) provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation or practice is just and reasonable..." (Emphasis supplied) As heretofore shown, the respondent railroads and their supporting shipper adequately addressed themselves to that issue and persuaded the Commission, in the face of vigorous opposition, that the proposed unit train rates were just and reasonable, highly profitable to both the Soo Line and Erie, and would enhance Erie's net revenue position. The Commission, both in its Initial Decision and the two subsequent

^{*/} To the contrary, ConAgra's Traffic Manager stated he had no interest in such a rate (App. 708a).

appellate decisions, considered all of the evidence which the record contained relating to other legal issues. Specifically, it considered and rejected evidence and allegations that the proposed rates violated either Section 3(1) or Section 4 [49 U.S.C. §4].

Petitioners herein believe the Commission was correct in holding that Great Lakes water carriers were not entitled to Section 3(4) protection for the reasons stated in the Commission decisions and that the Court erred in ruling otherwise. However, it is not necessary to belabor that issue further. The fact is, that the Commission, on the record, could make no finding of discrimination against water carriers because no evidence supporting such a finding was introduced by any party.^{*/} Had the Commission made such a finding in this case it would clearly have been vulnerable to attack in a judicial review proceeding as a finding not supported by evidence. (See cases cited at p. 40-43 of the Soo Line-ConAgra brief to the Court.)

It is equally clear that any carrier or other party who might allege that the proposed unit train rates discriminated against Great Lakes carriers in violation of Section 3(4) of the Act carried the burden of proving the truth of that allegation. As previously noted, this Court at p. 2134 of its decision observed that the carriers

^{*/} Actually, much of the evidence introduced by the railroads and ConAgra clearly supports a contrary finding. (See Nos. (4)-(9) at pp. 5-6, supra)

did not have the initial affirmative burden of proving no Section 3(1) violation. The same is true with respect to Section 3(4).

In Seatrain Lines v. United States, 233 F.Supp. 199, 210 (D.N.J. 1964), a case cited by this Court in its decision, the Court stated:

...Seatrain established a prima facie case of discrimination, and that there-
upon the burden passed to the Western
railroads.... (Emphasis supplied)
133 F.Supp. at 210.

In Western Pacific v. United States, 263 F.Supp. 140, 146 (1966), the United States District Court, N.D. California, relying upon Seatrain, held that the carrier alleging Section 3(4) discrimination had the "burden of proof...to show that a discrimination is practiced by defendants...." The burden of proceeding would then shift to defendants to prove some dissimilarity of operating conditions that would substantially affect them in the event they were required to grant equality of treatment." (Emphasis supplied)

In the Martins Creek case, after demonstrating to the Commission's satisfaction that the Martins Creek unit train rates were just and reasonable from the standpoint of their own revenue requirements, respondents had no corresponding duty to rebut evidence of alleged §3(4) violations because no evidence of any such violation was introduced by protestants.

In its brief to the Court, New York contended that the Commission's own findings indicate a prima facie showing of a §3(4) violation because "cost studies accepted by the

Commission showed that Erie's yield under the reduced rate on the all-rail route was 18 percent of fully distributed rail cost in rail owned cars, and 14 percent in shipper-owned cars whereas Erie's yield in the rail leg of the water route was approximately 4 to 6 times higher." However, the evidence introduced by the railroads also showed, as noted at pages 4-6, supra, that the unit train operation had many operational advantages to Erie (i.e. avoidance of Buffalo terminal congestion, availability of Soo Line car fleet, etc.). Furthermore, the record also reflects the fact that the Erie faces intense motor carrier competition in seeking to move wheat from Buffalo to Martins Creek which has severely limited its participation in that movement whereas it has an excellent opportunity of handling all of ConAgra's wheat requirements at Martins Creek if the unit train rates are approved. The Commission, after reviewing all of the evidence, concluded that approval of the unit train rates would enhance the Erie's net revenue position. New York does not contest the adequacy of that finding in this review proceeding.

Ironically, the petition for reconsideration filed by Lake Carriers' Association states:

Protestant Lake Carriers' Association accepts respondents' premise that, in setting the level of the proposed rates, respondents do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper. In essence, as long as the alternative cost to the shipper all-rail versus lake-rail are equivalent, the lake carrier industry has no objection. (Emphasis supplied) (App. 516a)

The lake carriers' August 19, 1974, petition for reconsideration expressed concern that the railroads would not properly readjust their rates as lake carrier costs increased and it concluded:

If the respondents are sincere in their assertion that they do not intend to go any lower than necessary to meet the alternative transportation cost to the shipper it would seem that the [summer] all-rail unit train rate from the Twin Cities to Martins Creek [as of August, 1974] should not be pegged any lower than 88¢... (App. 518a)

As noted in the carriers' reply to lake carriers' petition for reconsideration, in August, 1974, the summer rate from the Twin Cities and Twin Ports had been increased to 89¢, 1¢ higher than that suggested by the lake carriers. (App. 601a)

Thus, it is pointless to remand the case for determination as to whether the lake carriers are discriminated against when they themselves have advised the Commission that they have "no objection" to the rates as published.

THE COURT ERRED IN CONSIDERING
NEW YORK'S SECTION 3(4) CLAIM ON THE MERITS

The Court rejected these petitioners' "Tucker Doctrine" argument with a brief footnote discussion at p. 2125 of the opinion. It noted that in Tucker "the point urged on review had never been presented to the administrative agency. Here the question whether the proposed rates are unlawful under §3(4) was presented to the Commission and was expressly ruled upon in the Initial Decision...We have the benefit of the Commission's views on the issue." The Court then proceeded

to find the Commission's consideration to be inadequate and ordered a remand.

Soo and ConAgra respectfully submit that the better rule, as enunciated in Slay Transportation Co., supra, is that parties are not entitled to judicial review of administrative error contentions which were not raised in petitions for reconsideration. As noted at p. 45 of our brief to the Court, the Slay ruling has been followed in other jurisdictions. The instant case provides a classic example of why the Slay rule should be followed.

While no protesting party introduced evidence relating to Section 3(4) of the Act, the brief filed by Port Authority, which is not a Great Lakes ship owner, did raise and discuss the issue. (App. 291a-308a) The Port Authority brief argues that water carriers are entitled to Section 3(4) protection even when carrying exempt commodities, a contention which the Court adopted. The balance of the Port Authority's Section 3(4) argument relates primarily to the lawfulness of the Buffalo unit train rate rather than the Martins Creek rate.

Port Authority did not petition for reconsideration of the Commission's Initial Decision finding the winter rate from the Twin Cities and the dual rates from the Twin Ports to be lawful. No other party, to our knowledge, raised such an issue at any time in the Commission proceedings.

In Hennessey v. Securities & Exchange Commission, 285 F.2d 511, 514 (1961) the United States Court of Appeals for the Third Circuit stated:

It is well established that issues not effectively presented to an administrative agency, where ample opportunity to do so had been afforded, cannot be raised on appeal of that agency's decision.
(Emphasis added)

We respectfully submit that this Court erred in entertaining a legal argument which was not supported by evidence in the agency proceeding, not "effectively presented" to the Commission in Port Authority's brief filed prior to the Commission's rendering of its Initial Decision, not mentioned in any pleadings addressed to Division 2 acting in its appellate capacity, and which relates to unit train rates acknowledged by the Lake Carrier's Association as not being objectionable. Furthermore, New York and S & E Shipping should be precluded from raising this issue because no party to the Commission proceedings ever requested Erie to publish unit train rates from Buffalo to Martins Creek.

CONCLUSION

These petitioners respectfully request the Court to take judicial notice of the fact that much of the railroad industry is in dire financial straits and that the bankrupt Erie, subsequent to the Commission proceedings, was forced to become part of Conrail. A major contributing factor to the railroad industry's economic plight is the extreme difficulty it faces in attempting to compete with unregulated motor carriers in the transportation of agricultural commodities, including grain, and unregulated water carriers plying our inland waterways in the transportation of all bulk commodities, including

grain. The holding of this Court that such water carriers are entitled to Section 3(4) protection as connecting lines "subject to the provisions of this part" when transporting exempt agricultural commodities is highly inimical to the interests of the railroad industry and contrary to the goals expressed in the National Transportation Policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act. so administered as to recognize and preserve the interent advantages of each..." (Emphasis supplied) 49 U.S.C., preceeding Sec. 1.

The Court's ruling that a Great Lakes water carrier is a "connecting line" because the Erie serves Buffalo, New York even though the direct and natural Soo Line-Erie route is not via Buffalo, stretches the law to protect exempt water carrier; who are entitled to no such protection. It may well be that Section 3(4) could be invoked if rail carriers select circuitous, unnatural routes to circumvent Section 3(4). Such was not the case here.

Even if the Court refuses rehearing on these grounds, the Soo Line and ConAgra are entitled to relief sought herein for the reasons set forth in the body of this petition.

WHEREFORE, the petition for rehearing should be granted and the Orders of the Commission here under review should be affirmed in all respects.

Because the Court's judgment involves issues of monumental importance to these petitioners and the entire railroad

industry, oral argument, rehearing and reconsideration by
the Court en banc is requested.

Respectfully submitted,

BY LOUIS A H. PEPPER
36 West 44 Street
New York, New York 10036
(212) 575-0925
C. HAROLD PETERSON
Soo Line Railroad Company
Soo Line Building
Minneapolis, Minnesota 55440
(612) 332-1261
PETER A. GREENE
404 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-8800

Dated: April 4, 1977

Attorneys for Soo Line
Railroad Company and
ConAgra, Incorporated

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of April, 1977, served
copies of the foregoing petition, via first-class mail, postage prepaid,
upon the following persons:

Louis J. Lefkowitz
Attorney General
State of New York
Albany, New York 12224

Ruth Kessler Toch
Solicitor General
State of New York
Albany, New York 12224

Bryce Rea, Jr., Esquire
Patrick McEligot, Esquire
Rea, Cross & Knebel
Counsel for State of New York
700 World Trade Center Building
918 16th Street
Washington, D.C. 20006

Thomas E. Kauper, Esquire
Assistant Attorney General
Department of Justice
Washington, D.C. 20432

Robert J. Ables, Esquire
Counsel for S & E Shipping Corporation
Federal Bar Building West
1819 Eighth Street, N.W.
Washington, D.C. 20006

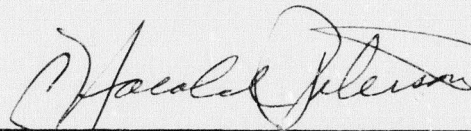
Arthur J. Cerra, Esquire
General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

Hanford O'Hara, Esquire
Assistant General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

Gordon P. MacDougall, Esquire
Special Counsel
Commonwealth of Pennsylvania and
Pennsylvania Public Utility Commission
1100 17th Street, N.W.
Washington, D.C. 20036

Robert P. Kane
Attorney General
Commonwealth of Pennsylvania
Capitol Annex
Harrisburg, Pennsylvania 17120

Edward J. Morris, Counsel
Alfred N. Lowenstein, Asst. Counsel
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17120



C. HAROLD PETERSON